Supreme Court, U.S.
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No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

WOODROW W. DAWAHARE,
Petitioner,

v.

ADAM A. SPENCER,
DEAN WITTER REYNOLDS, INC., And
SMITH BARNEY, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Must federal courts apply such a narrow interpretation of judicial review of an arbitration award that the court may not vacate an arbitration award that shows on its face damages which are grossly inadequate in light of the evidence presented at the arbitration hearing and that applies a measure of compensatory damages that bears no reasonable relationship to the actual loss suffered, and where the broker was terminated for "unauthorized trading."

PARTIES TO THE PROCEEDING

Petitioner

Woodrow W. Dawahare. Petitioner is an individual and has no corporate affiliations.

Respondents

Adam A. Spencer, Dean Witter Reynolds, Inc. and Smith Barney, Inc.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 210 F.3d 666 (6th Cir. 2000). A copy of the Opinion is included in Appendix A at 1a-9a. The Opinion & Order of the District Court for the Eastern District of Kentucky is not published, but a copy is included in Appendix B at 11a-18a. The District Court entered final judgment on September 8, 1998, which is printed in Appendix B at 19a.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit entered its Opinion on April 27, 2000. No Petition for Rehearing was filed by any party. This Petition for Writ of Certiorari is filed within 90 days of the entry of the Opinion. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

STATUTORY PROVISIONS INVOLVED

UNITED STATES CODE
ARBITRATION
9 U.S.C. § 10

§ 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award

upon the application of any party to the arbitration—

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

(a) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating

> the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

STATEMENT OF THE CASE

Petitioner, Woodrow W. Dawahare (hereinafter "Mr. Dawahare"), is an established Kentucky businessman. At the time of the transactions that form the basis of this action he was in his late 70's and his health was beginning to decline.

This petition arises from Mr. Dawahare's claims of inappropriate trading activities in certain of his brokerage accounts. The dispute was submitted to arbitration. The arbitration panel entered an award in favor of Mr. Dawahare against the broker involved (Adam Spencer) and one of the brokerage firms (Dean Witter Reynolds, Inc.). However, the measure of damages applied by the arbitrators did not reflect the evidence presented. The evidence showed damages to Mr. Dawahare in excess of $600,000.00, and actual loss in his account of over $490,000.00. The arbitration award was only $26,000.00 compensatory damages and $24,000.00 punitive damages.

Around November 5, 1992, Mr. Dawahare established a brokerage account with Shearson Lehman Brothers, Inc. Adam A. Spencer (hereinafter "Spencer"), was the financial consultant assigned to Mr. Dawahare's account. Smith Barney, Inc. (hereinafter "Smith Barney") subsequently acquired the broker-dealer operations of Shearson.

On or about September 15, 1994, Spencer terminated his employment with Smith Barney and became employed by Dean Witter Reynolds, Inc. (hereinafter "Dean Witter"). Spencer requested, and Mr. Dawahare agreed, to transfer all the positions in his account to Dean Witter.

Although Mr. Dawahare was not aware of it, he was Spencer's only substantial customer and Spencer's only substantial source of commission income from Smith Barney and Dean Witter. Spencer caused Mr. Dawahare to engage in a high level of risky trading and an accelerating pattern of short selling.

Dean Witter was specifically aware of Mr. Dawahare's account prior to and at the time of Spencer's transfer. In fact, Mr. Dawahare's account was an integral part of Spencer's deal when he came over from Smith Barney and Spencer was expected to do a certain amount of business with Mr. Dawahare's account in order to earn a bonus. Spencer received an "up front" bonus from Dean Witter, one half of which was deferred for one year, to be paid only if Spencer generated commissions on Mr. Dawahare's account in the amount of 70% of the commissions he generated on that account the previous year.

Mr. Dawahare's portfolio before and after the time of the transfer to Dean Witter was unsuitable for a man in his circumstances and inconsistent with Mr. Dawahare's financial circumstances and reasonable goals.

Beginning in 1992, Mr. Dawahare's memory and ability to understand the nature of the trading in his account declined. In March of 1994, Mr. Dawahare was diagnosed with probable Alzheimer's Disease and was incapable of effectively understanding his financial affairs.

Spencer visited Mr. Dawahare in 1994 to advise him of the potential move to Dean Witter. Richard Dawahare (Mr. Dawahare's son) specifically instructed Spencer to terminate all short selling in the account, because Mr. Dawahare did not understand the nature of short trading or the risks involved. Spencer disregarded those instructions and increased the short positions in Mr. Dawahare's account.

Shortly after Mr. Dawahare's account was transferred to Dean Witter, the value of Mr. Dawahare's short positions declined precipitously. On October 31, 1994 the value of the account was $705,621. On December 31, 1994, the same account was valued at only $210,299. The actual loss was $495,322.

In order to induce Mr. Dawahare to maintain the positions and to refrain from bringing the situation to the attention of Spencer's superiors, Spencer promised, both orally and in writing, to guarantee the account against losses.

In late December 1994, Richard Dawahare became aware that Spencer had not followed his instructions and attempted to contact him. Dean Witter became aware of the contacts and terminated Spencer for cause, on February 6, 1995. The reason given for the discharge was "unauthorized trading".

An arbitration proceeding was initiated in 1996 (hereinafter the "Arbitration") before the National Association of Securities Dealers, Inc., pursuant to a pre-dispute arbitration agreement contained in securities accounts agreements with each of the firms, Smith Barney and Dean Witter. The claim submitted to the arbitration panel was for recovery of Mr. Dawahare's damages arising from unsuitable trades in his securities accounts.

Mr. Dawahare presented expert testimony to the panel at the arbitration hearing that Spencer churned his account while he was employed by both Smith Barney and Dean Witter. Mr. Dawahare also presented expert testimony that the trades in his account were unsuitable for a person of his age and circumstances, that his previous investment history indicated an approach geared to preserving capital, and that investors typically become more conservative with age.

Mr. Dawahare also presented at the arbitration hearing expert testimony that his actual damages arising from the improper and unsuitable course of trading by Spencer amounted to $604,463.06 as of August 31, 1997, based on a reasonable rate of return of 6%. Smith Barney presented in-house expert testimony to prove that Mr. Dawahare's account had a net gain when the account was transferred to Dean Witter, and that all of the loss occurred after the transfer to Dean Witter. Dean Witter provided no expert testimony at all to contradict Mr. Dawahare's expert. There was no dispute that Mr. Dawahare's account had an actual loss in value of $495,322, between the October 31, 1994 and December 31, 1994.

After hearing the evidence, the arbitration panel returned an award, finding Spencer liable to Mr. Dawahare and assessing compensatory damages of One Thousand Dollars ($1,000.00). The panel also found Dean Witter liable to Mr. Dawahare, assessing compensatory damages of $25,000.00 and punitive damages of $24,000.00. Smith Barney was found not liable to Mr. Dawahare. There was no evidence submitted at the hearing that showed compensatory damages of only $26,000.00.

On January 21, 1998, Mr. Dawahare filed a Motion to Vacate Arbitration Award in the U.S. District Court for the

Eastern District of Kentucky. The transcript, based on tapes of the arbitration hearing, was entered in the record on June 2, 1998.

On September 8, 1998 the District Court entered an Opinion & Order and Judgment (App. B at 11a and 19a) denying Mr. Dawahare's motion to vacate arbitration award and granting the cross-motions of Smith Barney and Dean Witter to affirm the award. The District Court had jurisdiction over the original action pursuant to 28 U.S.C. §1332 because this is a case between citizens of different states and the amount in controversy exceeded $75,000.00.

Mr. Dawahare filed a Notice of Appeal to the Sixth Circuit. The Sixth Circuit affirmed the District Court Judgment by an Opinion entered April 27, 2000 (App. A at 1a).

ARGUMENT FOR GRANTING WRIT

The restrictive interpretation placed upon the vacatur provisions of the Federal Arbitration Act by the District Court and Court of Appeals effectively denies Mr. Dawahare any remedy for the inadequacies of the arbitration panel. The arbitration panel awarded $1,000 compensatory damages against Adam Spencer, $25,000 compensatory damages against Dean Witter and $24,000 punitive damages against Dean Witter. Mr. Dawahare's evidence showed damages in excess of $600,000. The actual undisputed loss in Mr. Dawahare's account was in excess of $490,000. Not only is the arbitration award only a fraction of the actual loss in value, but there is no evidence at all of damages only in the amount of $26,000.

The inadequacy of the damage award, in and of itself, shows evident partiality on the part of the arbitration panel. That requires vacatur of the arbitration award under the Federal Arbitration Act, 9 U.S.C. §10. The arbitration panel found Dean Witter's actions so egregious as to award punitive damages, but, in effect, only awarded nominal damages for compensation of Mr. Dawahare's loss.

In addition, the district court recognized that the measure of damages used by the arbitration panel bore no reasonable relationship to the improper actions shown by the evidence. As the court said in the Opinion & Order (App. B at 11a, 17a):

> The Court would be remiss, however, in failing to express its disagreement with the outcome. While there was indeed evidence to support the result reached, in the court's view, the panel's finding as to the measure of damages attributable to Dean Witter does not measure up to its utter lack of institutional control over Mr. Spencer.

Despite this finding with respect to the inadequacy of the measure of damages applied by the arbitration panel, both the district court and the Court of Appeals were constrained by a restrictive interpretation of the principles involving vacatur of arbitration awards. Because of this restrictive interpretation, both the district court and the Court of Appeals declined to vacate the arbitration award, despite the obvious flaws in the award. Nevertheless, it is clear that the measure of damages applied by the arbitration panel, where liability was so clear that punitive damages were imposed, was in manifest disregard of the law of damages.

Since methods of alternative dispute resolution, including arbitration, are becoming more widespread, the need for the Court to clarify the extent of judicial review of arbitration awards is urgent. This is particularly true in businesses, such as the securities brokerage business, where arbitration is required by the contract for services. These kinds of "captive" arbitration contracts demand reasonable judicial review to ensure that consumers have access to adequate proceedings for dispute resolution.

ARGUMENT 1

The arbitration award amount adjudged in favor of Mr. Dawahare was so grossly inadequate given the evidence presented at the hearing that evident partiality is shown.

The arbitration award in this case was grossly inadequate on its face, and bore no rational relationship to the evidence of damages presented. However, the narrow interpretation of judicial review for evident partiality prevented the lower courts from vacating the award.

This Court should review the standards for judicial review for evident partiality, and make it clear that an arbitration award may be set aside for evident partiality when it is grossly inadequate on its face.

The Federal Arbitration Act (9 U.S.C. §10) provides that an arbitration award may be set aside where "there was evident partiality or corruption in the arbitrators . . ." The lower courts have interpreted that to mean that an award can be set aside for evident partiality only if there is extrinsic

evidence of actual conflict of interest or partiality on the part of one or more of the arbitrators.

It was this narrow interpretation of judicial review of an arbitration award that prevented the lower courts from vacating the award. The arbitration panel assessed compensatory damages at $1,000 against Spencer, $25,000 against Dean Witter, with $24,000 in punitive damages to Dean Witter. No evidence was presented to the arbitrators which supported an award of compensatory damages of $26,000, or a total award of $50,000. The expert testimony offered by Mr. Dawahare showed damages as of August 1997 in excess of $600,000. It was undisputed that Mr. Dawahare's account suffered a loss in value of over $490,000 as of January 1995. Dean Witter put on no expert testimony to contradict the assessment of damages of over $600,000.

This Court should clarify that an arbitration award may be vacated even where there is no extrinsic proof of actual bias, prejudice or conflict of interest, where the award, on its face, shows evident partiality.

In *Commonwealth Coatings Corp. v. Continental Casualty, Co.*, 393 U.S. 145 (1968), this Court, by plurality opinion, ruled that proof of actual bias was not required to vacate an arbitration award, but that the "appearance of bias" should be avoided. In *Morelite Construction v. New York District Council*, 748 F.2d 79, 84 (2d Cir. 1984), the central question for determining "evident partiality" was whether "a reasonable person" would have to conclude after examining all of the circumstances, that an arbitrator was partial to one party.

Other courts have recognized that the arbitration award itself can show evident partiality. In *Carrs Fork*

Corporation v. Kodak Mining Co., 809 S.W.2d 699, 702 (Ky. 1991), the Kentucky Supreme Court ruled:

> An award may be so grossly inadequate or excessive as to be in effect a fraud and subject to vacation by a court although no actual fraud is claimed.

In *Tinaway v. Merrill Lynch & Co.*, 658 F.Supp. 576 (S.D.N.Y. 1987), the court addressed the situation in which Merrill Lynch lost the entire portfolio of Mr. Tinaway by investing in a company which had suspended production because of a strike. The arbitration panel awarded Mr. Tinaway $2,000 in damages, while his testimony indicated an actual loss of $35,720. The district court ruled that the arbitration award must be vacated:

> The Court, however, is unable to infer the ground for the arbitrators' decision from the facts of this case. Merrill Lynch admits that it knew of the tenuous position of Tinaway's investment and did not disclose the circumstances to Tinaway when it invested his monies in that stock. Under these circumstances, reduction of the amount of the award by ninety-five percent can only represent "evident partiality" on the part of the arbitrators toward Merrill Lynch.

The same principle applies in this case. The district court was compelled to comment that the measure of damages used by the arbitrators did not reflect the lack of institutional control by Dean Witter.

The award made by the arbitration panel in this case is so grossly inadequate, in view of the evidence of loss of value, that it shows evident partiality on its face. This Court should grant review in order to clarify that judicial review is broad enough to find evident partiality where the arbitration award is grossly inadequate on its face.

ARGUMENT 2

The actions of the arbitration panel in awarding compensatory damages in an amount not supported by the evidence and in failing to award compensatory damages for at least the undisputed loss suffered in Mr. Dawahare's account constitute a manifest disregard of the law controlling the measure of compensatory damages, and requires vacation of the award.

This Court should grant review in order to clarify that the decision in *Wilko v. Swan*, 346 U.S. 427 (1953), is broad enough to permit vacatur of an arbitration award for manifest disregard of the law, with respect to the application of the law of damages. In this case, the arbitration panel completely ignored the evidence concerning damages, including undisputed evidence which showed that Mr. Dawahare's account lost over $490,000 in value. The panel assessed compensatory damages of only $26,000, for which there was no evidence. Judicial review of this obvious disregard of the law of damages was construed so narrowly that the award could not be vacated. This Court should grant review and clarify that the *Wilko* decision is broad enough to apply to manifest disregard of the law of damages.

Some circuits have tentatively taken this step. This Court should grant review to clarify that such an approach is consistent with *Wilko*.

In *Advest, Inc. v. McCarthy*, 914 F.2d 6, 9 (1st Cir. 1990), the court applied the standard of manifest disregard of the law to an issue concerning damages. Although the court found no manifest disregard in that particular case, it articulated the standard for applying that principle to "instances where it is clear from the record that the arbitrator recognized the applicable law--and then ignored it." *French v. Merrill Lynch, Pierce, Fenner & Smith*, 784 F.2d 902, 906 (9th Cir. 1986), recognized that if the arbitrators' award is completely irrational it should be vacated.

In *Glennon v. Dean Witter Reynolds, Inc.*, 83 F.3d, 132 (6th Cir. 1996), punitive damages were at issue. It was contended that there was no adequate review of the arbitration award because the circuit court could not vacate an award where there was "no evidence" to support a punitive damages award. The court, in determining that there were adequate standards for review, ruled (*Id.* at 139): "We conclude that the manifest disregard of the law standard permits vacatur of those punitive damage awards that are supported by *no* evidence." In *Sargent v. Paine Webber, Jackson & Curtis, Inc.*, 674 F.Supp. 920 (D.D.C. 1987), an investor sued a broker for failing to follow his instructions. The investor losses were estimated at $256,000. The arbitration panel awarded about one-fifth of that amount. While the court recognized that "judicial review of arbitrators' decisions is very narrowly limited", the court also ruled (*Id.* at 922):

> It is well settled, however, that a court should not attempt to enforce an award that is ambiguous, indefinite or irrational. Although

> a court is precluded from overturning errors in factual determinations, "nevertheless, if an examination of the record before the arbitrator reveals *no support whatever* for his determinations, his award must be vacated." *NF & M Corp. v. United Steelworkers of America*, 524 F.2d 756, 760 (3d Cir. 1975). (Emphasis added).

In *Clemons v. Dean Witter Reynolds, Inc.*, 708 F.Supp. 62 (S.D.N.Y. 1989), the investor suffered losses at the hands of a broker in excess of $900,000, for which they provided evidence at the hearing. The arbitrators found liability but awarded damages of only $25,000 each to the clients, even though the broker offered no evidence of an alternative damage figure. In remanding the case back to the arbitrators, the court ruled (*Id.* at 63):

> There is however a serious question as to whether the damages awarded are sustainable on the evidence presented before the arbitrators. Although arbitrators may properly render a lump sum award without disclosing their rationale and courts will not ordinarily inquire into the basis of the award, where the award has no factual support the Court may properly vacate the award. *See Koch Oil, S.A. v. Transocean Gulf Oil Co.*, 751 F.2d 551, 554 (2d Cir. 1985); *Kurt Orban Co. v. Angeles Metal Systems*, 573 F.2d 739, 740 (2d Cir. 1978).

These same principles support vacatur of Mr. Dawahare's arbitration award. Here the arbitration panel assessed essentially nominal damages, even though the loss in

value of Mr. Dawahare's account was in excess of $490,000. There is no evidence anywhere in the record of the arbitration hearing that supports compensatory damages of only $26,000. Dean Witter put on no expert testimony of damages. The expert testimony put on by Smith Barney concerned the status of the account only up to the month it was transferred to Dean Witter. Both lower courts declined to vacate the arbitrator's decision because they perceived judicial review of the award on the basis of manifest disregard of the law to be extremely narrow. While the district court recognized that "the measure of damages attributable to Dean Witter does not measure up to its utter lack of institutional control over Mr. Spencer", (Opinion & Order, App. B at 11a, 17a) the court was constrained by this narrow interpretation of judicial review.

As a practical matter, these issues concerning judicial review of arbitration awards go well beyond Mr. Dawahare's dispute. The use of arbitration as a vehicle for alternative dispute resolution has expanded greatly. The desirability of such a trend is no longer an open issue. The question that faces this Court is not only how to make arbitration a process that is fair and consistent in its application, but to insure the credibility of the process by an adequate procedure for judicial review.

If the participants in an arbitration do not have the assurance that impartial principles of law are being applied, arbitration will lose its effectiveness as a technique of dispute resolution. This Court must insure that courts are not prevented from fulfilling their responsibility to insure the preservation of substantive legal rights because of undue restraints on judicial review.

This Court must clearly establish standards of judicial review that hold arbitration panels accountable to established legal standards. Traditional narrow approaches, which confirm

arbitration awards that are, on their face, contrary to law, are not sufficient to fulfill this responsibility. Without some reasonable level of accountability, there is no assurance to participants in the arbitration process that their substantive rights under a variety of laws are fully protected.

The case at bar is a singular example. While the testimony indicated damages of over $600,000.00, and a loss of equity in Mr. Dawahare's account of over $490,000.00, the arbitrators arbitrarily picked a figure of $26,000.00 for compensatory damages. Even though liability was so clear that punitive damages were assessed, the panel essentially awarded nominal damages. Only meaningful judicial review of the application of the law to the evidence will provide accountability on the part of arbitrators for their decisions.

An example of the need for accountability can be found in *Montes v. Shearson Lehman Brothers*, 128 F.3d 1456 (11th Cir. 1997). In that case, the 11th Circuit adopted manifest disregard of the law as grounds for overturning arbitration decisions. It is of particular interest that *Montes* not only adopted the doctrine of manifest disregard of the law, but also found a violation of that standard. The court cited certain instances of improper advocacy before the arbitration panel, in which counsel encouraged the panel to disregard the law (*Id.* at 1459):

> I know, as I have served many times as an arbitrator, that you as an arbitrator are not guided strictly to follow case law precedent.
>
> You have to decide whether you're going to follow the statutes that have been presented to you, or whether you will do or want to do or

> should do what is right and just and equitable in this case.
>
> The law says one thing. What equity demands and requires and is saying is another.

See, William Nortman and Franklin D. Ormsten, *Expanded Review of Arbitration Decisions*, 7/9/98 N.Y.L.J. 1, (col. 1).

If arbitration is to remain a credible means of dispute resolution, there must be meaningful accountability of arbitrators to the courts. Only effective judicial review of arbitration decisions can provide that level of accountability. In Mr. Dawahare's case, this means that the arbitration award must be vacated, because the measure of damages bore no relationship to the evidence of damages presented at the hearing.

CONCLUSION

The decisions of the District Court and the Court of Appeals in this case apply too narrow a standard for judicial review of arbitration awards. If alternative dispute resolution techniques, such as arbitration, are to provide meaningful alternatives to litigation, there must be minimal accountability. Either established principles of judicial review, such as evident partiality and manifest disregard of the law, must be interpreted broadly enough to provide this meaningful review or other principles must be developed to provide such accountability. Unless this Court offers additional guidance in this area, the credibility of alternative dispute resolution techniques will decline. This Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

/s/_____

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed April 27, 2000]

No. 98-6356

Woodrow W. Dawahare, *Plaintiff-Appellant,*	)
v.	)
Adam A. Spencer; Dean Witter Reynolds, Inc.; Smith Barney, Inc., *Defendants-Appellees.*	)

Appeal from the United States District Court
for the Eastern District of Kentucky at Lexington.
No. 98-00027--Karl S. Forester, District Judge.
Argued: September 14, 1999

Before: SUHRHEINRICH, COLE, and GIBSON*, Circuit Judges.

* The Honorable John R. Gibson, Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

OPINION

JOHN R. GIBSON, Circuit Judge. Woodrow Dawahare appeals from the district court's denial of his motion to vacate the arbitration award he obtained against Adam Spencer and Dean Witter Reynolds, Inc. Dawahare argues that because the damages awarded were grossly inadequate and bore no relationship to the evidence submitted, the award itself shows evident partiality. Further, he argues that the arbitrators manifestly disregarded the law of damages. We affirm the district court's confirmation of the award.

In view of the limited issues presented, many of the factual details are irrelevant to our discussion. Dawahare established a brokerage account at Shearson Lehman Brothers, Inc. alter receiving a "cold call" from Spencer. Smith Barney, Inc. acquired Shearson Lehman sometime after Dawahare opened his account. In August 1994, Spencer informed Dawahare that he planned to leave Smith Barney and go to Dean Witter, and Dawahare agreed to transfer his account. Both before and after the transfer, Spencer engaged in short trading with the Dawahare account. As a result of the price increase of stocks in which Dawahare held short positions, the account declined in value by $495,322 during the last two months of 1994. After Dean Witter learned that Dawahare's son had complaints about the handling of his father's account, Spencer was fired.

Pursuant to pre-dispute arbitration agreements between the parties, Dawahare submitted the controversy to a National Association of Securities Dealers, Inc. arbitration panel in 1996. Dawahare claimed that Spencer had engaged in

unsuitable and excessive trading, causing him damages in excess of $600,000. The NASD panel denied Dawahare's claims against Smith Barney, but found in his favor against Dean Witter, awarding $25,000 in compensatory damages and $24,000 in punitive damages. The arbitrators also found Spencer liable to Dawahare for $1000. In the district court, Dawahare moved to vacate the award; the court denied his motion and granted cross motions to confirm the award.

The district court had before it the transcript of the arbitration hearing. At the hearing, Dawahare presented evidence that his health was failing and that he was unable to understand the significance of the short trading strategy pursued by Spencer because of progressive dementia. His wife testified that she thought Dawahare was in over his head. The brokerage firms maintained that Dawahare was an experienced investor, that he was happy with Spencer and with his handling of the account while it was profitable, and that they were unaware of any health or memory problems Dawahare may have had.

Smith Barney's expert witness testified that Dawahare's account increased in value while it was at Smith Barney. Dawahare's expert witness testified that a conservative investment strategy, assuming a reasonable return of six percent, would have resulted in an account value of $776,603.28 in contrast to the $258,731.97 the Dean Witter account was worth at the end of January 1995. Dawahare's expert then added interest to the difference between these two figures, arriving at a total of $604,463.06 in damages. Dean Witter argued that Dawahare had authorized the activity in his account. Neither Dawahare nor Spencer testified at the arbitration hearing.

The district court rejected Dawahare's argument that the arbitration award should be vacated because of evident partiality or manifest disregard of the law and confirmed the award. We review the confirmation of an arbitration award for clear error on findings of fact and de novo on questions of law. *See Glennon v. Dean Witter Reynolds, Inc.*, 83 F.3d 132, 135 (6th Cir. 1996); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*, 70 F.3d 418, 420 (6th Cir. 1995).

"It is well established that courts should play only a limited role in reviewing the decisions of arbitrators." *Shelby County Health Care Corp. v. A.F.S.C.M.E., Local 1733*, 967 F.2d 1091, 1094 (6th Cir. 1992). The Federal Arbitration Act presumes that arbitration awards will be confirmed. *See* 9 U.S.C. § 9 (1994); *Andersons, Inc. v. Horton Farms, Inc.*, 166 F.3d 308, 328 (6th Cir. 1998). A court may vacate an arbitration award in the following situations: (1) where the award was procured by fraud, (2) where the arbitrators were evidently partial or corrupt, (3) where the arbitrators misbehaved so that a party's rights were prejudiced, or (4) where the arbitrators exceeded their powers or executed them so that a final, definite award was not made. *See* 9 U.S.C. § 10(a) (1994). In addition, a reviewing court may vacate an award where the arbitrators have manifestly disregarded the law. *See Glennon*, 83 F.3d at 136.

Dawahare first argues that the award should be vacated under 9 U.S.C. § 10(a) because the discrepancy between the damages awarded and the damages alleged shows evident partiality. We see no basis to sustain this argument. Only if a reasonable person would have to conclude that the arbitration panel was partial to a party will we find evident partiality. *See Andersons, Inc.*, 166 F.3d at 328. "The

alleged partiality must be direct, definite, and capable of demonstration, and 'the party asserting [it] . . . must establish specific facts that indicate improper motives on the part of the arbitrator.'" *Id.* at 329 (quoting *Consolidation Coal Co. v. Local 1643, United Mine Workers of Am.*, 48 F.3d 125, 129 (4th Cir. 1995)). Because Dawahare points to nothing but the amount of the award to establish evident partiality, there is no basis to vacate the award on this ground.

Dawahare also argues that the substantial disparity between the damages awarded and the damages evidence presented establishes a manifest disregard of the law of damages. He asserts that the common law entitles him to recover all losses proximately caused by the wrongful acts of the liable parties. Our review for manifest disregard of the law does not open the door to extensive review of arbitral awards. *See Jaros*, 70 F.3d at 421 ("This court has emphasized that manifest disregard of the law is a very narrow standard of review.").

An arbitration decision "must fly in the face of established legal precedent" for us to find manifest disregard of the law. *Id.* An arbitration panel acts with manifest disregard if "(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle." *Id.* Thus, to find manifest disregard a court must find two things: the relevant law must be clearly defined and the arbitrator must have consciously chosen not to apply it. *See M & C Corp. v. Erwin Behr GmbH& Co.*, 87 F.3d 844, 851 n.3 (6th Cir. 1996) (noting that if its review of an arbitral award were based on FAA standards, there was no manifest disregard since any mistake in applying the law was inadvertent and not

based on a conscious decision to ignore the law). Arbitrators are not required to explain their decisions. If they choose not to do so, it is all but impossible to determine whether they acted with manifest disregard for the law. *See Jaros,* 70 F.3d at 421.

Chief Judge Martin, concurring in *Federated Department Stores, Inc. v. J.V.B. Industries, Inc.*, 894 F.2d 862 (6th Cir. 1990), recognized the problems inherent in reviewing an arbitration award for manifest disregard of the law where the arbitrators fail to state a reason for their decision. He stated that courts are forced to participate in a "judicial snipe hunt" with the parties arguing about law that may or may not have been disregarded by the arbitrators. *See id.* at 871. He would allow reversal when there are no reasons given for an arbitration decision and the record is insufficient to show that the arbitrators did not manifestly disregard the law. *See id.* No panel of this court has adopted this reasoning.

The arbitrators' decision in this case outlined the parties' contentions and discussed the claims and evidence in some detail for some three-and-a-half, single-spaced pages. The monetary award simply designated the amount of damages without detailed explanation. It is difficult to say that the arbitrators refused to heed a clearly defined legal principle. Dawahare points to nothing in the record that shows the arbitrators' awareness of the common law that he alleges to be applicable. This is not a case where one of the parties clearly stated the law and the arbitrators expressly chose not to follow it.

Since Supreme Court dictum established the manifest disregard of the law standard forty-seven years ago, *see Wilko v. Swan,* 346 U.S. 427, 436 (1953), *overruled on other grounds, Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), only two federal courts of appeals have used it to vacate arbitration decisions. Dawahare understandably cites to these cases, but to no avail, as both cases are easily distinguished from the case before us.

The Second Circuit held that an arbitration panel that denied relief on an ADEA claim showed manifest disregard by ignoring "the law or the evidence or both" where the plaintiff presented strong evidence that he was fired because of his age. *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 204 (2d Cir. 1998), *cert. denied,* 119 S.Ct. 1286 (1999). The court pointed out that the parties explained the applicable law to the arbitrators. *See id.* at 204. This is important because manifest disregard requires awareness of the relevant law. *See Jaros,* 70 F.3d at 421 (stating that an arbitrator must refuse to heed a clearly defined legal principle in order to manifestly disregard the law). Here, Dawahare points to nothing in the record that indicates the arbitration panel was aware of the law he alleges it ignored. Also, the *Halligan* court particularly emphasized the importance of assuring plaintiffs with employment discrimination claims a forum in which to effectively vindicate their statutory rights. *See* 148 F.3d at 201-03.

In *Montes v. Shearson Lehman Brothers, Inc.*, 128 F.3d 1456 (11th Cir. 1997), the Eleventh Circuit reversed the district court's confirmation of an arbitration award because the arbitration panel acted in manifest disregard of the law. An employee sued her former employer for overtime pay

pursuant to the Fair Labor Standards Act, and the dispute went to arbitration. *See id.* at 1458. The employer's attorney repeatedly urged the arbitration panel to disregard the FLSA when making its decision and the panel denied the employee's claim. *See id.* at 1458-59. Because there was no evidence the arbitrators rejected the urging and because there was a lack of factual support for the ruling, the court remanded with instructions to refer the case to a new arbitration panel. *See id.* at 1464. The concurrence emphasized that the decision was narrowly limited to the unusual facts of the case. *See id.* Here, there is no evidence that Spencer, Smith Barney, or Dean Witter urged the arbitrators to disregard the applicable law.

Dawahare's vague assertion that the arbitrators manifestly disregarded the common law of damages falls far short of the necessary showing of the law that clearly applied in the case and of conscious disregard of that law by the arbitrators. It is possible to argue that the arbitrators misapplied the law of damages, that is, punitive damages would only be warranted for egregious conduct by Dean Witter and, in that case, a compensatory award of less than 5% of the damages alleged is likely too low. To show manifest disregard, however, a party must show more than "[a] mere error in interpretation or application of the law." *Jaros,* 70 F.3d at 421. There is simply no evidence that the arbitrators were aware of some relevant law on damages that they chose to ignore, and we question whether the damages evidence presented by Dawahare required any particular outcome.

During closing argument at the arbitration hearing, Dawahare's attorney characterized the damages as two types:

excessive commissions paid while Spencer churned the account at Smith Barney and the loss in value that occurred at Dean Witter due to the short positions in the account. His expert, however, concluded that Dawahare should recover the amount of money that his account would have earned had it been invested conservatively and eamed 6%. Dawahare's attorney stated: "So, I would like to give you a nice clean theory for allocating this award among these respondents, and I'm afraid I can't do that. I'm going to have to leave it to your wisdom." Dawahare cannot rely upon the wisdom of the decision makers without citing any rule of law to support his damages claim and then later argue that the arbitrators disregarded the law.

Dawahare's argument on manifest disregard of the law is premised on the fact that the only damages evidence was his expert's opinion that he had sustained damages in excess of $600,000. In essence, he argues that the arbitrators were compelled to accept this testimony and award that amount. We agree with the district court's observation that "[e]xpert testimony, even if uncontradicted, may be believed in its entirety, in part, or not at all." *See also Quinones-Pacheco v. American Airlines, Inc.*, 979 F.2d 1, 5 (lst Cir. 1992) (fact finder not ordinarily bound by uncontradicted expert opinion testimony, particularly where testimony "lacks great convictive force" in context of evidence as a whole); *Gregg v. U. S. Indus., Inc.*, 887 F.2d 1462, 1469-70 (11th Cir. 1989) (expert testimony is not conclusive and need not be accepted). The court also pointed out that the expert's opinion had been impeached on cross-examination and that there was evidence that Dawahare maintained substantial control over his investments. For us to hold that the arbitration panel was compelled to accept Dawahare's expert's

damages evidence would be to disregard the fact finder's responsibility to evaluate testimony.

We decline to adopt Dawahare's suggestion that we engage in a more extensive review of arbitration awards. To do so would undermine the goal of the arbitration process: to resolve disputes efficiently while avoiding extended litigation. *See, e.g., Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp.*, 103 F.3d 9, 12 (2d Cir. 1997); *Island Creek Coal Sales Co. v. City of Gainesville*, 764 F.2d 437, 441 (6th Cir. 1985).

Smith Barney requests attorneys' fees and double the costs incurred in this appeal, arguing that Dawahare's appeal is frivolous. We deny Smith Barney's motion for sanctions. For the foregoing reasons, the judgment of the district court is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

[Filed September 8, 1998]

No. 98-27

WOODROW W. DAWAHARE, *Plaintiff*,

v.

ADAM A. SPENCER, *et al.*, *Defendants*.

OPINION & ORDER

This matter is before the Court pursuant to Plaintiff's motion to vacate the arbitration award and Defendant Smith Barney's and Defendant Dean Witter Reynold's cross-motion to confirm the award. Having been fully briefed, said motions are ripe for review.

I. Factual Background.

Plaintiff Woodrow Dawahare established a brokerage account at Shearson Lehman Brothers, Inc. Shearson's broker-dealer operations were later acquired by Defendant

Smith Barney, Inc. Defendant Adam Spencer is a registered stockbroker and while employed by Smith Barney, he managed Plaintiff's account. When Spencer resigned from Smith Barney in 1994 and was hired by Defendant Dean Witter Reynolds, Plaintiff's account was transferred to Dean Witter to allow Spencer to remain as Plaintiff's broker. According to Robert Berg of Dean Witter, Plaintiff's account was an integral part of the decision to hire Spencer.

Plaintiff alleges that his primary investment objectives are similar to almost all investors: safety of principal and growth. He claims, however, that Spencer engaged in a high level of trading and an "increasing and accelerating pattern of short selling." When Plaintiff's son, Richard Dawahare, became aware this pattern, he contacted Spencer and instructed him to terminate the practice as Plaintiff, over eighty years of age, did not understand the nature of short trading or the risks involved.[1] According to Plaintiff, Spencer did not heed this command and increased the short positions in the account, leaving his account in a position unsuitable for an investor with his objectives.

One of the stocks in which Plaintiff held substantial short positions was America On Line (AOL). Shortly after his account was transferred to Dean Witter, AOL's stock price rose rapidly causing Plaintiff's short positions to substantially decline in value. Neither Spencer nor Dean Witter advised Plaintiff to cover or place stop-loss orders on the short positions. Based on the losses in value of his

---

[1] Richard Dawahare held a power of attorney over his father's account but declined to execute it.

holdings in AOL and other short positions, Plaintiff alleges that from October 1994 to December 1994, the net worth of his account declined by nearly $500,000. Mr. Berg was made aware of Plaintiff's displeasure over the status of his account and Spencer was ultimately terminated.

Pursuant to a pre-dispute arbitration agreement contained in the securities accounts contracts between Plaintiff and Smith Barney and Dean Witter, Plaintiff initiated an arbitration proceeding before the National Association of Securities Dealers, Inc. Following a six day hearing, the three member panel concluded (1) Adam Spencer was liable to Plaintiff for $1,000.00; (2) Smith Barney was not liable; and (3) Dean Witter was liable for $25,000.00 in compensatory damages and $24,000.00 in punitive damages. The cross claims between Dean Witter and Smith Barney were dismissed. Based on his assertion that this result bore no relationship to the evidence presented at the hearing, Plaintiff initiated this action pursuant to 9 U.S.C. §10 to vacate the award.

II. Discussion.

Plaintiff objects to the amount of damages awarded by the arbitration panel. According to Plaintiff, there was no evidence in the record to support such a finding; the arbitration panel was not impartial; and the decision is in manifest disregard of the law.

Under the Federal Arbitration Act (FAA) 9 U.S.C. §1 *et seq.* a court may vacate an award

> (1) Where the award was procured by corruption, fraud or undue means.
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
>
> (5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

9 U.S.C, §10(a). Generally, the district court's review of an arbitration award is limited to the bases identified in 9 U.S.C. §10 and a reviewing court may not overturn an arbitrator's findings of fact. *See United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987); *NCR, Corp. v. Sac-Co., Inc.*, 43 F.3d 1076, 1079 (6th Cir. 1995). Courts play a limited role in reviewing an arbitrator's decision. *Shelby Co. Health Care v. A.F.S.C.M.E. Local 1733,* 967 F.2d 1091, 1094 (6th Cir, 1992). As Dean Witter points out, the deference afforded an arbiter's decision under the FAA results in a court's power of review being "among the

narrowest known to the law." *Denver & Rio Grande Western Ry, Co. v. Union Pacific Ry. Co.*, 119 F.3d 847, 849 (10th Cir, 1997). A district court does not review the merits of an award nor instruct as to the computation of damages. *Marion Mfg, Co. v. Long*, 588 F.2d 538, 541 (6th Cir. 1978). Plaintiff's challenges to the award will be addressed in turn.

a. Does the award constitute a manifest disregard for the law?

In light of the aforementioned standards, the Court will not disturb the panel's findings as to liability and damages unless such an award represents a manifest disregard for the law. Plaintiff argues, in essence, that because only Plaintiff's expert, Dr. Officer, opined as to the amount of damages sustained, the panel was bound either to award the amount proffered by said expert or nothing. Thus, the argument goes, the award reflects a manifest disregard for the requirement that the panel's findings must be supported by the evidence before it.

Errors in interpretation or applicability of the law do not support a motion to vacate. Instead, "the decision must fly in the face of clearly established legal precedent." *Glennon v. Dean Witter Reynolds, Inc.*, 83 F.3d 132, 136 (6th Cir. 1996). The error must be obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator." *M&C Corp. v. Erwin Behr GmbH& Co.*, 87 F.3d 844, 851 (6th Cir. 1996). The award alone is not proof of a manifest disregard of the law. *O.R. Securities v. Professional Planning Ass'n,*. 857 F.2d 742, 747 (11th Cir. 1988).

The arbiter, as a trier of fact, may make credibility determinations and accord the evidence its appropriate weight. *Arkwright Mut. Ins. Co. v. Gwinner Oil Inc.*, 125 F.3d 1176, 1183 (8th Cir. 1997). Expert testimony, even if uncontradicted, may be believed in its entirety, in part, or not at all. *See Gregg v. U.S. Industries, Inc.*, 887 F.2d 1462, 1469 (11th Cir. 1989). With respect to resolution of questions of fact, if there is "even a barely colorable justification for the outcome reached" the award must be confirmed. *Willemijn Houdstermaatschappij, BN v. Standard Microsystems, Corp.*, 103 F.3d 9, 13 (2nd Cir. 1997).

Here, Plaintiff offers nothing more than his contention that the panel's conclusions were contrary to the evidence in support of his "manifest disregard" argument. A review of the record reveals that sufficient evidence existed to support its award. First, with respect to Dr, Officer's opinion, the manner in which he arrived at a figure for damages was significantly impeached on cross-examination. In addition, the testimonies of Mr. Robert Berg of Dean Witter and Mrs. Dawahare support a finding that Plaintiff maintained substantial control over his investments which further supported a finding that Plaintiff himself was responsible for a substantial portion of his losses. In addition, Mr. Berg testified that the number of transactions was consistent with an aggressive investor such as Plaintiff, whose objective was to invest in speculative ventures. Finally, the testimony of Ms. Tiffany Michel that Plaintiff's account was in the black when transferred from Smith Barney supports the panel's decision of no liability on the part of Smith Barney. As there is ample evidence upon which the panel's decision rests, the Court finds the arbitration panel did not act in manifest disregard of the law.

b. Was the arbitration panel partial.

Failure to raise a challenge to the arbitration proceeding based on partiality prior to an award results in a waiver of such a challenge. *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1358 (6th Cir. 1989). Here, there is nothing in the record indicating Plaintiff raised this issue during the arbitration proceedings. In addition, Plaintiff alleges no facts supporting bias which surfaced after the award, other than his displeasure with the award. Therefore, the Court may not now review Plaintiff's partiality challenge.[2]

It is outside the province of the Court to substitute its own factual findings for those of the panel. The Court would be remiss, however, in failing to express its disagreement with the outcome. While there was indeed evidence to support the result reached, in the Court's view, the panel's funding as to the measure of damages attributable to Dean Witter does not measure up to its utter lack of institutional control over Mr. Spencer.

Based on the foregoing, **IT IS HEREBY ORDERED**

(1) Plaintiff's motion to vacate the arbitration award [DE #1] is **DENIED**;

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[2] Furthermore, Plaintiff fails to allege specific facts of bias. *See Apperson*, 879 F.2d at 1360. Therefore, this portion of Plaintiff's challenge is without merit.

(2) Dean Witter Reynolds' and Smith Barney's cross motions to confirm the award [DE #5 and DE #16] are **GRANTED**, and

(3) judgment in favor of Defendant's will be entered contemporaneously with this opinion and order,

This 8th day of September, 1998

/s/_____
KARL S. FORESTER, JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

[Filed September 8, 1998]

No. 98-27

WOODROW W. DAWAHARE, *Plaintiff*,	)
v.	)
ADAM A. SPENCER, *et al.*, *Defendants*.	)

JUDGMENT

In accordance with the opinion and order entered contemporaneously with this judgment, **IT IS HEREBY ORDERED AND ADJUDGED**

(1) the arbitration award entered in the above-styled matter is **CONFIRMED**;

(2) judgment is entered in favor of Defendant Adam Spencer, Smith Barney and Dean Witter Reynolds;

(3) the action is **DISMISSED WITH PREJUDICE**;

(4) this judgment is **FINAL AND APPEALABLE**, no just cause for delay exists; and

(5) this matter is **STRICKEN** from the active docket.

This 8th day of September, 1998.

/s/_____
KARL S. FORESTER, JUDGE

Supreme Court, U.S.
FILED
AUG 22 2000
CLERK

(2)

No. 00-154

IN THE

Supreme Court of the United States

WOODROW W. DAWAHARE,

Petitioner,

v.

ADAM A. SPENCER,
DEAN WITTER REYNOLDS, INC.
and SMITH BARNEY, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT DEAN WITTER REYNOLDS, INC.

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PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

In addition to the parties listed by Petitioner, it should be noted that subsequent to the initiation of this proceeding, Dean Witter Reynolds, Inc. merged with Morgan Stanley, Inc. and the name is now Morgan Stanley Dean Witter, Inc.

Dean Witter Reynolds, Inc. is a merged entity of Morgan Stanley Dean Witter, Inc. There are no publicly held companies owning 10% or more of the corporate stock of Morgan Stanley Dean Witter, Inc.

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COUNTERSTATEMENT OF THE FACTS

The petitioner in his Statement of the Case omits many facts that would bear on the issues if the Petition were granted. The respondent ("Dean Witter") points out the omitted facts in the Counterstatement of the Facts.

Petitioner has long been a successful businessman and speculative investor. He has for more than twenty years invested in equity stocks through dealings with brokers. At the arbitration hearing it was established that he had engaged in transactions with at least sixteen brokerage firms. He was a speculative investor who bought and sold gold and penny stocks, engaged in short selling and options and invested in thoroughbred horses and second mortgages. Petitioner's federal income tax returns for the years 1990-94 were introduced into evidence before the arbitration panel and in addition to showing transactions in penny stocks, gold stocks and options showed an annual adjusted gross income of more than $250,000 per year. Petitioner has complained of and proceeded against other stockbrokers in the past when his investments have had shown losses.

Petitioner met Adam Spencer ("Spencer"), a broker for Shearson, through a "cold call" from Spencer to petitioner. Sometime thereafter petitioner opened accounts through Spencer at Shearson. Smith Barney acquired Shearson and petitioner continued transacting business through Spencer. The accounts were very active with frequent communications between petitioner and Spencer. While Spencer was acting as petitioner's broker, petitioner commenced engaging in short transactions. A short transaction was where the investor hoped that the price of the stock decreased because he would then make a profit at the time he closed out the transaction.

This investment strategy was not inconsistent with the past speculative ventures by petitioner. Initially he made substantial amounts of money through short transactions.

Petitioner developed a close personal relationship with Spencer. He traveled to New York and had dinner with Spencer. Spencer traveled to Lexington, Kentucky on two occasions, February and August, 1994, and stayed at petitioner's home while in Lexington. Petitioner's family members were present when petitioner entertained Spencer.

Spencer's supervisor, in the ordinary course of business, checked with petitioner in July, 1994 about petitioner's accounts and found petitioner well satisfied with Spencer's services.

When Spencer came to Kentucky to visit petitioner in August, 1994 he advised petitioner and petitioner's son, Richard Dawahare, a lawyer, that he, Spencer, was moving to Dean Witter. Petitioner agreed and the account transfer was completed on October 3, 1994. In addition, Richard Dawahare, a lawyer, business executive and trustee of the Dawahare Family Trust, transferred trust assets to Dean Witter for Spencer to manage. Dean Witter recruited Spencer on the advice of a broker known to Robert Berg, Manager of the Dean Witter facility at Mt. Kisco, New York. Spencer explained the business that he was doing with the petitioner and further believed he was on the verge of attracting significant business from Dawahare family members and friends. Exhibit 98, a Dean Witter new account form for petitioner, dated September 8, 1994, indicated annual income of $100,000, $3.5 million in net worth, $2 million in liquid net worth with investment objectives in order of priority being speculation, capital appreciation, aggressive income,

income. Spencer brought with him a new account Smith Barney document showing Dawahare Associates, Inc., c/o W.W. Dawahare, petitioner, had a net worth of $15 million. The petitioner signed a document with Dean Witter giving petitioner margin privileges. This gave him the ability to borrow against the accounts in his portfolio and to deal in short transactions. There were no complaints made to Robert Berg or anyone at Dean Witter concerning the conduct of Adam Spencer until January 16, 1995 when Mr. Berg received a fax copy of a letter dated January 13, 1995 from Richard Dawahare. This letter made reference to an earlier guaranty letter which Adam Spencer had sent to petitioner in December, 1994. Such a guaranty letter was contrary to the policy of Dean Witter. Dean Witter terminated Spencer upon being advised of the complaint of Dawahare and the letter of guaranty.

Sometime after Dean Witter became aware of the guaranty letter, it was advised that Richard Dawahare had held a power of attorney for petitioner since November 19, 1993. The existence of the power of attorney had not been made known to Smith Barney or Dean Witter. The power of attorney did not restrict the ability of the petitioner to deal with brokers. Petitioner had continued to deal with Arnie Weslen of Prudential Securities, a long-time financial adviser, and as late as September-December, 1994 was involved with transactions with First Hanover Investment Company.

It was long after Spencer was terminated that Richard Dawahare advised Dean Witter that petitioner was mentally impaired. Doctor Knox, who first saw petitioner on March 14, 1994, recorded in his report of January 30, 1996, an exhibit made a part of the record before the arbitrators, that

Richard Dawahare did not become aware of Dr. Knox's Alzheimer diagnosis until the summer of 1995. Dr. Knox testified that petitioner's condition was gradually progressive dementia, but that petitioner had no problem with his finances or real estate ventures. Dr. Knox testified that on August 1, 1994 he recorded that petitioner's memory had improved significantly since the last visit. Judy Dawahare, wife of petitioner, testified that petitioner was one of the Dawahare brothers who had a company with retail stores throughout Kentucky and in several states. Petitioner was active in setting up three stores in Lexington, Kentucky. He also managed a very small estate into a large estate. She testified that he went to work every business day and was still so doing at the time of the arbitration hearing. She testified that she had a Masters Degree as a psychiatric clinical nurse specialist and despite the fact that she knew of Dr. Knox's diagnosis of early stages of Alzheimer in August of 1994 that she never told anybody at Smith Barney of the diagnosis.

Richard Dawahare testified that in February or March, 1994, he talked to Arnie Weslen, the Prudential broker, about the volatility in his father's account at Smith Barney. Despite gaining information about the short positions and the risk accompanying such positions, he took no action and did not discuss the account with his father. Richard Dawahare testified that he felt his father was competent to understand the statements sent by Smith Barney and the net equity of the account. He stated that the first time that he looked at his father's monthly statements was in December, 1994. Tara Hellard, secretary for petitioner, testified that petitioner received statements of daily trades and monthly statements from the brokerage firms. She said he had so many statements coming in each month that she put them in one summary sheet so he could look at them and know what he had without

having to go through ten or twelve different company statements. About 1994 petitioner was trustee of the S.S. Dawahare estate and no one made any effort to remove him as trustee. The estate owns a shopping center and other property.

REASONS FOR DENYING THE WRIT

The petitioner's argument for granting the writ assumes "inadequacies of the arbitration panel." Petition for Writ of Certiorari, p. 7. Petitioner's claim of inadequacies is nothing more than a dissatisfaction with the amount of damages awarded him.

I.

THE PETITION FAILS TO SET FORTH REASONS FOR ENLARGING JUDICIAL REVIEW OF ARBITRATION DECISIONS.

There is no valid reason set forth in petitioner's Petition for Writ of Certiorari or based on the facts of this case to extend judicial review of arbitration awards. In *United Paperworkers v. Misco*, 484 U.S. 29, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987), this Court in speaking about arbitration in a labor management dispute said:

> . . . In such cases, and this is such a case, the Court made clear almost 30 years ago that the courts play only a limited role when asked to review the decision of an arbitrator. The courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract.

Id. at 484 U.S. 36.

The Court, citing *Steeleworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960), stated:

> . . . The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the award.

Id.

The same statement is applicable to the federal policy for settling claims between stock brokerage firms and their customers.

The petitioner's reliance on *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 89 S. Ct. 337, 21 L. Ed. 2d 301 (1968) in support of his argument that judicial review of arbitration decisions should be enlarged is not well founded. There it was revealed after the award that the arbitrator had earned approximately $12,000 in fees for providing services to one of the parties to the arbitration over a period of four or five years prior to the arbitration. Four justices said that courts should be even more scrupulous to safeguard the impartiality of arbitrators than judges and that the effectiveness of the arbitration process would not be hampered by the requirement that arbitrators disclose to parties any dealings which might create an impression of possible bias. Justice White with Justice Marshall concurring joined in the majority opinion but stated that the Court did not decide that arbitrators were to be held to the standard of decorum for Article III judges. The opinion observed that it was enough for present purposes to hold, as the Court did, that where the arbitrator has a substantial interest which has done more than a trivial business with a party that fact must be disclosed. Here the petitioner does not contend the arbitrators had any interests showing possible bias.

The case of *Tinsway v. Merrill Lynch & Co.*, 685 F. Supp. 576 (S.D.N.Y. 1987) is a failure of disclosure case where Merrill Lynch admitted it knew the tenuous position of Mr. Tinsway's investments and did not disclose the circumstances to him. There are no such facts in this case. Here the petitioner was almost daily in contact with the broker Spencer and received daily and monthly accounting of all trades on his behalf.

The case of *Carrs Fork Corp. v. Kodak Min. Co., Ky.*, 809 S.W.2d 699 (1991) is readily distinguishable. The law under which the case was decided was Kentucky statutory law pertaining to arbitrations. Kentucky Revised Statutes 417.018. Further, the Court pointed out that under Kentucky law there exists ". . . the legal maxim that the law abhors a forfeiture of a coal lease." *Id.* at 701. The arbitration decision was set aside because of the failure of the panel to follow the law of Kentucky.

None of the cases cited by petitioner support extending judicial review of arbitration decisions in cases where the customer of a brokerage company is simply dissatisfied with the arbitrator's award.

II.

THERE IS NO EVIDENCE OF PARTIALITY.

As to the issue of partiality, there is nothing in the record to indicate such. The District Judge pointed out there is nothing in the record to indicate that petitioner raised the issue during the arbitration procedure or alleged any "facts supporting bias which surfaced after the award, other than his displeasure with the award." District Court Opinion &

Order and Judgment, Appendix to Petition for Writ of Certiorari, p. 17a. Petitioner has not and cannot point out "specific facts that indicate improper motives on the part of the arbitrators." *Anderson, Inc. v. Horton Farms, Inc.*, 166 F.3d 308, 329 (6th Cir. 1998), quoting *Consolidation Coal Co. v. Local 1643, United Mine Workers of Am.*, 48 F.3d 125, 129 (4th Cir. 1995). In *Robbins v. Day*, 954 F.2d 679, *cert. denied*, 506 U.S. 870, 113 S. Ct. 201, 121 L. Ed. 2d 143 (11th Cir. 1992), the Court held that the arbitration statute does not allow an award to be vacated solely on the basis of error of law or interpretation, but requires something more, such as misconduct pertaining to proceedings on the part of the arbitrators or parties. Here there is no showing of misconduct pertaining to the proceedings on the part of the arbitrators or parties.

III.

THERE IS NO EVIDENCE OF A MANIFEST DISREGARD OF LAW BY THE ARBITRATION PANEL.

Petitioner also claims a manifest disregard of law because the arbitration panel did not award him an amount equal to his claimed loss. Petitioner bases his loss claim on the testimony of his claimed expert witness, Dr. Dennis Officer. The District Court found that Dr. Officer's testimony "was significantly impeached on cross examination." District Court Opinion & Order and Judgment, Appendix to Petition for Writ of Certiorari, p. 16a. Section 10323 of the Code of Arbitration Procedure (NASD Regulations) states: "The arbitrators shall determine the materiality and relevance of any evidence proffered and shall not be bound by rules governing the admissibility of evidence." The arbitrators as

the triers of fact could accept all, part or none of Dr. Officer's testimony. *Smith v. C.I.R.*, 800 F.2d 930 (9th Cir. 1986). It appears obvious that the arbitration panel did not give much weight to the damage testimony of Dr. Officer.

Further, there was evidence showing the petitioner maintained substantial control over his accounts with the brokerage firms throughout the relevant time period and thus was accountable for losses caused by his trades. In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*, 70 F.3d 418, 421 (6th Cir. 1995), the Court said that an arbitration decision "must fly in the face of established legal precedent" for there to be a finding of manifest disregard of the law. Petitioner has failed to make such a showing. A similar challenge to an arbitration award was made in *McIlroy v. Painewebber, Inc.*, 989 F.2d 817 (1993) where the arbitrators award was $40,875 on a claim of $1,033,750. The Court rejected the investor's argument that the award was the product of a gross mistake as to imply failure to exercise honest judgment. The Court pointed out that the investor offered no evidence of a gross mistake save the discrepancy between his claim and the award. The petitioner here offered no evidence of partiality or manifest disregard of the law other than the discrepancy between his claim and the award.

In summary, the facts show neither evidence of partiality nor a manifest disregard of the law by the arbitration panel. The petitioner chose to proceed to arbitration, raised no questions of partiality during the arbitration proceedings or in any post arbitration proceeding before the arbitration panel. In fact, during petitioner's counsel's closing argument he stated: "So, I would like to give you a nice clean theory for allocating this award among the respondents, and I'm afraid I can't do that. I'm going to leave it to your wisdom."

Court of Appeals Opinion, Appendix to Petition for Writ of Certiorari, p. 9a. The Court of Appeals stated: "Dawahare cannot rely upon the wisdom of the decision makers without citing any rule of law to support his damages claim and then later argue that the arbitrators disregarded the law. *Id.*"

CONCLUSION

For all of the foregoing reasons, respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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